90-417

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALAN S. KRAMER,

Petitioner,

—vs.—

GAINES W. HAMMOND, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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Dated: September 7, 1990

QUESTIONS PRESENTED

When a New York lawyer, representing California clients engaged in a business transaction centered outside of South Carolina, is sued in South Carolina by a South Carolina participant in the transaction:

1. Is the New York lawyer subject to personal jurisdiction in South Carolina based on plaintiff's purported *prima facie* showing of jurisdiction, or does the due process clause require jurisdiction to be established by a preponderance of the evidence when plaintiff has had an adequate opportunity through extensive discovery to support the jurisdictional allegations of his complaint?

2. In subjecting the New York lawyer to personal jurisdiction, did the South Carolina Supreme Court properly consider convenience to the parties without making a threshold finding that the New York lawyer purposefully established minimum contacts with South Carolina?

3. Could the New York lawyer establish minimum contacts in South Carolina without purposefully directing activities in a manner sufficient either to invoke the benefits and protections of South Carolina law, or to reasonably anticipate litigation in South Carolina?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner Alan S. Kramer and the respondent Gaines W. Hammond, Jr. In addition to petitioner, the complaint in the underlying action names Butler, Means, Evins & Browne, a South Carolina law partnership, and Thomas A. Evins and Stanley T. Case, members of the Butler, Means firm, as defendants. The decisions below concern only Kramer, who was the only movant in the trial court and the only appellant in the South Carolina Supreme Court.

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IN THE

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OCTOBER TERM, 1990

No. _____

ALAN S. KRAMER,

Petitioner,

—vs.—

GAINES W. HAMMOND, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

The petitioner Alan S. Kramer respectfully prays that a writ of certiorari issue to review the opinion and decision of the Supreme Court of South Carolina entered in these proceedings on January 22, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 388 S.E.2d 796, and is reprinted in the Appendix, at 1a-6a.

The unpublished order of the Court of Common Pleas of Spartanburg County, South Carolina, is reprinted in the Appendix, at 7a-8a.

JURISDICTION

The opinion of the Supreme Court of South Carolina was entered on January 22, 1990. A petition for rehearing was filed on January 29, 1990, and was denied on June 11, 1990.[1] The Petition for a Writ of Certiorari was filed within ninety days of June 11, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).[2]

CONSTITUTIONAL PROVISION INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part:

> No state . . . shall deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

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1 The order denying rehearing is reprinted in the Appendix, at 9a.

2 This Court has repeatedly held that cases presenting jurisdictional issues in this posture are final within the meaning of 28 U.S.C. § 1257(a). *See Burnham v. Superior Court*, _____ U.S. _____, 110 S. Ct. 2105, 2109 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108 (1987); *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984); *Rush v. Savchuk*, 444 U.S. 320, 324-25 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288-91 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 88-90 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 195-96 n.12 (1977).

In addition, issue one, which raises the appropriate standard of proof governing a jurisdiction testing motion decided after substantial discovery, "is plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). Neither would it be reviewable by this Court after trial and appeal through the state-court system. The federal issue cannot survive the remand to the trial court because at trial the jurisdictional issue must be determined on the higher preponderance standard, thus foreclosing petitioner from raising the issue that the higher standard should have been imposed in the circumstances presented here at the motion to dismiss stage. *Cf. Cox Broadcasting Corp.*, 420 U.S. at 483-84.

Finally, resolution of the due process issue now will avoid subjecting petitioner "to long and complex litigation which may all be for naught if consideration of the preliminary question of [personal jurisdiction] is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

STATEMENT OF THE CASE

In the case below, Respondent, Hammond, a South Carolina resident, claims that his own lawyers, also South Carolina residents, conspired with Petitioner, Kramer, a New York lawyer, to reduce his subscription interest in a Delaware corporation formed to commercialize a medical invention of three California residents (the "California Group"), who were represented by Kramer. (R. 214-15)[3]

Hammond left South Carolina to secure a role for himself in the commercialization of this invention. The invention improved technology for shattering kidney stones noninvasively through extracorporeal shockwave lithotripsy. (R. 892-96) To obtain this role Hammond first met with one of the inventors in Colorado. He then met with the inventors in California at meetings, which were also attended by Kramer, representing the California Group, and Thomas A. Evins and Stanley T. Case, of the South Carolina firm of Butler, Means, Evins & Browne, representing Hammond. (R. 17, 21-22, 219-20)

Following the meetings in California, Kramer drafted agreements in New York to implement the proposed transaction among the parties. Kramer negotiated the terms of these agreements with Hammond's lawyers at meetings in California and New York, and by telephone. (R. 17-18, 21-22) First, he drafted a subscription agreement for a proposed Delaware corporation, initially called Hammond Technologies, Inc., and later renamed Medstone, International, Inc. ("Medstone"). (R. 321-27) Second, he drafted a proposed license agreement pursuant to which the California Group would provide the technology to the proposed Delaware corporation. The license required a royalty payment of approximately $1,000,000. Third, he drafted an option agreement,

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3 References are to the Transcript of Record before the South Carolina Supreme Court.

under which the technology offered by the license could be obtained upon payment of the license royalty on or prior to November 8, 1984. The option was issued to Hammond and later assigned to the proposed Delaware corporation pursuant to the subscription agreement. (R. 97) The subscribers for the proposed company's stock were Hammond, the California Group, Kramer, the Butler, Means firm, and three other individuals, who were residents of Virginia and California. (R. 91-92)

To raise the $1,000,000 license royalty the subscribers sought to sell a prototype of the invention to the Michael Reese Hospital and Medical Center ("Michael Reese") in Chicago. (R. 256) Kramer negotiated the contractual arrangement with Michael Reese on behalf of the subscribers in Illinois and by telephone between New York and Illinois. (R. 640)

Michael Reese required a letter of credit as a condition to the purchase. (R. 52-53, 256, 695-700) Hammond sought the letter of credit in Alabama from Dr. Gerald Wallace. (R. 347-48, 419-28, 1042) Wallace required Hammond to provide a guarantee of Wallace's liability under the letter of credit. (R. 426) The November 8th option deadline passed without Hammond providing the guarantee (R. 264) and without Wallace providing the letter of credit. (R. 252-53, 263-64)

When the option expired the California Group allowed Medstone to obtain the license under a revision of the subscription agreement pursuant to which Hammond's interest was reduced from 35,000 to 10,000 shares and those of the California Group, Kramer, and Butler, Means were increased. (R. 91-92, 106) Wallace was allowed to become a subscriber (R. 106) and agreed to provide the letter of credit without the guarantee from Hammond. (R. 866-67)

None of the agreements structuring the transaction chose South Carolina governing law. The option and license agreements chose California law. The agreement with Michael Reese chose Illinois law (R. 717, 754, 779, 941, 1018) and Hammond's agreement with Wallace chose Alabama law.

(R. 428) All of the meetings between participants, or between their lawyers, occurred outside South Carolina, primarily in California, New York, Illinois and Indiana. (R. 17-18, 21-22, 40, 256, 295-96)

On March 12, 1986, Hammond filed the case below.[4] On April 8, 1986, Kramer moved to dismiss Hammond's complaint for lack of personal jurisdiction pursuant to S.C.R. Civ. P. 12(b)(2)[5] on the grounds that the South Carolina long-arm statute[6] did not apply, and that any exercise of jurisdiction by South Carolina would violate the due process clause of the fourteenth amendment. After a year of jurisdictional discovery,[7] the trial court summarily denied Kramer's motion to dismiss. On January 22, 1990, the South Carolina Supreme Court affirmed the trial court decision, and on June 11, 1990, it denied Kramer's petition for rehearing. After the trial court decision, Hammond commenced a substantially similar action against Kramer in New York. *Hammond v. Kramer*, Index No. 21813/87 (Sup. Ct. N.Y. County, Sept. 4, 1987). This action was stayed *sua sponte* by the New York Supreme Court when Kramer promptly moved for summary judgment based on discovery taken in the South Carolina action.

The South Carolina Supreme Court first found Kramer subject to jurisdiction under the South Carolina long-arm

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4 Originally, Hammond sought actual damages in excess of $6,500,000 and punitive damages. (R. 2-13) In 1988, Hammond served and filed a "Proposed Supplemental Amended Complaint," in which he seeks actual damages in excess of $100,000,000, punitive damages, treble damages and attorney's fees.

5 Rule 12 of the South Carolina Rules of Civil Procedure, and accompanying Reporter's Notes, are reprinted in the Appendix, at 11a.

6 S.C. Code Ann. § 36-2-803 (Law. Co-op. 1976), which is reprinted in the Appendix, at 16a.

7 At Hammond's request, the trial court ordered extensive deposition and document discovery, resulting in a record in excess of 1300 pages of deposition testimony and in excess of 1400 pages of marked exhibits. The Transcript of Record before the South Carolina Supreme Court contained 1119 pages, mainly from this discovery.

statute, and then found that the exercise of long-arm jurisdiction comported with due process. The court applied a *prima facie* standard in its two-step approach: "[A]t the pretrial stage of the proceedings, the plaintiff need only make a prima facie showing by pleadings and affidavits." (388 S.E.2d at 798, App., at 4a) Long-arm jurisdiction was upheld entirely on Hammond's allegations that Kramer conspired to commit a tortious act in South Carolina. Due process was evaluated under South Carolina's own due process formula, which requires evaluation of four considerations:

1. The duration of the activity of the non-resident within the state;

2. The character and circumstances of the commission of the non-resident's act;

3. The inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the non-resident; and

4. The state's interest in exercising jurisdiction.

(388 S.E.2d at 798-99, App., at 5a.)

Although the opinion below did not separately analyze the "four considerations," due process was found satisfied based on Hammond's allegations, selected facts from the record without regard to their relevance to required minimum contacts, and the court's convenience finding.[8]

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8 After his petition for rehearing was denied, Kramer moved for a stay of his time to answer pending determination of his petition for a writ of certiorari. This request was denied. On August 9, 1990, Kramer served and filed his answer to Hammond's complaint, specifically asserting as an affirmative defense the existence of an arbitration agreement barring Hammond's claims. On August 10, 1990, Kramer commenced an action against Hammond in the United States District Court for the Southern District of New York pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, requesting an order enforcing the arbitration agreement, which requires binding arbitration in New York City pursuant to the Rules of the American Arbitration Association. *Kramer v. Hammond*, 90 Civ. 5226 (KTD) (S.D.N.Y., Aug. 10, 1990).

REASONS FOR GRANTING THE WRIT

I.

THE SOUTH CAROLINA SUPREME COURT'S APPLICATION OF A *PRIMA FACIE* STANDARD TO KRAMER'S MOTION TO DISMISS IS INCONSISTENT WITH PRINCIPLES ARTICULATED BY THIS COURT IN *CELOTEX*, *LIBERTY LOBBY*, AND *MATSUSHITA*

The evidentiary standard applicable to a jurisdiction testing motion decided after substantial discovery is a constitutional issue of great national importance because (1) it has never been addressed by this Court, (2) the holding below conflicts with principles articulated by this Court in the summary judgment context, (3) there is widespread confusion on this issue in the state and federal courts at all levels, and (4) until this Court definitively resolves this question, the confused situation will continue to disrupt the orderly administration of the law in a context that is certain to arise frequently.

A. Principles governing summary judgment are applicable to a motion to dismiss on jurisdictional grounds decided after a plaintiff has had adequate discovery to support the jurisdictional allegations of a complaint

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), this Court explained that

> the plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.* In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 322-23 (emphasis added). This Court further explained that the standard for granting summary judgment "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Id.* at 323 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (emphasis added)).

In *Liberty Lobby*, this Court pointed out "that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." 477 U.S. at 250 (citing *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943)). This Court "conclude[d] that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages." 477 U.S. at 255. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court warned that "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586 (footnote and citations omitted). This Court also stated in *Matsushita* that "[w]here the *record taken as a whole* could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* at 587 (emphasis added) (citing *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

The doctrinal principles and policies restated and developed in *Celotex*, *Liberty Lobby* and *Matsushita* are equally applicable to a motion to dismiss for lack of personal jurisdiction after a plaintiff has had a full opportunity to support the jurisdictional allegations of a complaint before decision on the Rule 12(b)(2) motion.[9] There is no reason, in logic

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9 At the summary judgment stage, a nonmoving party may seek additional discovery to oppose the motion pursuant to Fed. R. Civ. P. 56(f). *Accord* S.C.R. Civ. P. 56(f). While there is no similar provision in Federal or South Carolina Rule 12(b), there is no reason why a plaintiff cannot seek, nor why a court cannot grant, additional discovery, if necessary, to oppose a 12(b)(2) motion. Almost three-quarters of the states have adopted a proce-

or policy, why a plaintiff afforded a full opportunity to develop jurisdictional facts should escape dismissal when jurisdiction is properly challenged because most courts apply a weak threshold *prima facie* standard to the jurisdiction testing motion.[10] Some courts do apply the preponderance standard to a 12(b)(2) motion, but they are a distinct minority.[11]

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dural system modeled on the Federal Rules of Civil Procedure, including South Carolina, and accordingly this issue is discussed with reference to the federal rules. *See* Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1377-78 (1986).

Moreover, as in case below, discovery is almost always requested and ordered in some form prior to decision of a 12(b)(2) motion. *See, e.g.*, 2A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 12.07 [2.-2], at 12-59 (2d ed. 1990); 4 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 26.56[6] (2d ed. 1989); 5A C. Wright & A. Miller, *Federal Practice & Procedure* § 1351, at 253-59 (2d ed. 1990). *Cf. Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 196 (2d Cir. 1990) ("Plaintiffs conducted discovery for nearly a year.") (summary judgment), *petition for cert. filed*, 59 U.S.L.W. 3094 (U.S. July 24, 1990) (No. 90-207).

10 *See, e.g., Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d at 196-98 (on summary judgment, but extensively discussing standard under 12(b)(2)); *Michigan Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989); *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989); *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989); *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988); *Cutco Indus., Inc. v. Naughton*, 806 F.2d 361, 364-65 (2d Cir. 1986); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1284-86 (9th Cir. 1977); *McClelland v. Watling Ladder Co.*, 729 F. Supp. 1316, 1317-18 (W.D. Okla. 1990); *Cable News Network, Inc. v. Video Monitoring Servs. of America, Inc.*, 723 F. Supp. 765, 766-67 (N.D. Ga. 1989); *Perez-Rubio v. Wyckoff*, 718 F. Supp. 217, 227 (S.D.N.Y. 1989); *Kyle v. Continental Capital Corp.*, 575 F. Supp. 616, 618-20 (E.D. Pa. 1983); *Davis v. Eighth Judicial District Court*, 97 Nev. 332, 337, 629 P.2d 1209, 1212-13, *cert. denied*, 454 U.S. 1055 (1981); *Giachetti v. Holmes*, 14 Ohio App. 3d 306, 307, 471 N.E.2d 165, 167 (1984); *Ben's Marine Sales v. Sleek Craft Boats*, 502 A.2d 808, 810 & n.1 (R.I. 1985); *White v. Stephens*, 387 S.E.2d 260, 262 (S.C. 1990); 2A *Moore's Federal Practice*, *supra* note 9, ¶ 12.07 [2.-2], at 12-55-12-56.

11 *See, e.g., Newhard, Cook & Co. v. Inspired Life Centers, Inc.*, 895 F.2d 1226, 1228 (8th Cir. 1990) (confusingly applying both standards);

Under this Court's summary judgment principles, a plaintiff is not permitted to force a trial on the merits, after adequate discovery, when an essential element of a complaint cannot be supported. After adequate discovery, a plaintiff with a questionable jurisdictional claim should also not be permitted to force a trial on the merits without first establishing jurisdiction by the same preponderance of the evidence standard that will govern the issue on summary judgment, directed verdict, or trial.[12]

B. Federal and state courts have issued conflicting decisions on the evidentiary standard governing a jurisdiction testing motion decided after substantial discovery

If jurisdiction is tested at a preliminary hearing pursuant Rule 12(d),[13] on a motion for summary judgment under Rule

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Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120 (2d Cir. 1984) (following discovery plaintiff must establish jurisdiction by a preponderance of the evidence at a pretrial hearing or trial); *Marshall Exports, Inc. v. Phillips*, 507 F.2d 47, 49 (4th Cir. 1974); *Combs v. Bakker*, 692 F. Supp. 596, 603 (W.D.N.C. 1988), *vacated on other grounds*, 886 F.2d 673 (4th Cir. 1989); *Grill v. Walt Disney Co.*, 683 F. Supp. 66, 67-68 (S.D.N.Y. 1988) ("[W]here, as here, the parties have conducted *substantial discovery* on the jurisdictional issue, plaintiff may be *held to a higher standard of proof.*") (emphasis added); *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1043 n.1 (S.D.N.Y. 1987); *Sterling Indus., Corp. v. Telephone, Inc.*, 484 F. Supp. 1294, 1296 (W.D. Mich. 1980); *DiCesare-Engler Prods., Inc. v. Mainman Ltd.*, 81 F.R.D. 703, 705 (W.D. Pa. 1979); *Felix v. Bomoro Kommanditgesellshaft*, 196 Cal. App. 3d 106, 110, 241 Cal. Rptr. 670, 672 (1987). *Cf. Mid-States Aircraft Engines, Inc. v. Mize Co.*, 467 N.E.2d 1242, 1247 (Ct. App. Ind. 1984) ("party *challenging jurisdiction* must establish the lack thereof by a preponderance of the evidence") (emphasis added).

12 *Cf. KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278-80 (1936); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (competent proof by a preponderance of the evidence).

13 *See, e.g., Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d at 197; *First City Nat'l Bank & Trust Co. v. Simmons*, 878 F.2d 76, 79 (2d Cir. 1989); *Serras v. First Tenn. Bank N.A.*, 875 F.2d 1212, 1214 (6th Cir. 1989);

56,[14] or at trial,[15] jurisdiction must be established by a preponderance of the evidence.[16] In contrast, if jurisdiction is tested early in the 12(b)(2) stage without discovery materials, courts apply the *prima facie* standard, and many courts also "construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction."

Cutco Indus., Inc. v. Naughton, 806 F.2d 361, 364 (2d Cir. 1986); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984); *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Data Disc, Inc. v. Systems Technology Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *Blue Ball Properties, Inc. v. McClain*, 658 F. Supp. 1310, 1315 (D. Del. 1987); *Kyle v. Continental Capital Corp.*, 575 F. Supp. 616, 619 (E.D. Pa. 1983); *Giachetti v. Holmes*, 14 Ohio App. 3d 306, 307, 471 N.E.2d 165, 167 (1984); *Ben's Marine Sales v. Sleek Craft Boats*, 502 A.2d 808, 810 n.1 (R.I. 1985); 2A *Moore's Federal Practice*, *supra* note 9, ¶ 12.07[2.-2], at 12-57 & n.5.

14 *See, e.g., Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 & n.1 (9th Cir. 1986).

15 *See, e.g., Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d at 197; *Michigan Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989); *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989); *Serras v. First Tenn. Bank N.A.*, 875 F.2d 1212, 1214 (6th Cir. 1989); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Data Disc, Inc. v. Systems Technology Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 664 F. Supp. 713, 716 (S.D.N.Y. 1987), *aff'd in part and rev'd in part*, 886 F.2d 497 (2d Cir. 1989); *Giachetti v. Holmes*, 14 Ohio App. 3d 306, 307, 471 N.E.2d 165, 167 (1984); 2A *Moore's Federal Practice*, *supra* note 9, ¶ 12.07[2.-2], at 12-57 & n.5.

16 In addition, if a complaint requests a preliminary injunction, and a defendant moves to dismiss under Rule 12(b)(2), a plaintiff must establish jurisdiction by a preponderance of the evidence. *See, e.g., Visual Sciences, Inc. v. Integrated Communications Inc.*, 660 F.2d 56, 59 (2d Cir. 1981). *Cf. Industrial Elecs. Corp. v. Cline*, 330 F.2d 480, 482 (3d Cir. 1964) (subject matter jurisdiction); *A.H. Bull S.S. Co. v. National Marine Eng'rs Beneficial Ass'n*, 250 F.2d 332, 337 (2d Cir. 1957) (subject matter jurisdiction).

Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989).[17] When jurisdiction is tested at the 12(b)(2) stage upon limited discovery, the *prima facie* standard also generally applies.[18]

The context that has produced significant conflicts dividing the lower courts is when jurisdiction is tested at the 12(b)(2) stage after substantial discovery, but when a 12(d) preliminary hearing is unnecessary. In this situation some courts apply the *prima facie* standard,[19] while others apply the preponderance standard.[20]

As previously stated, when a plaintiff has had an adequate opportunity to support the jurisdictional allegations of a complaint through extensive discovery prior to decision of the 12(b)(2) motion, imposing the *prima facie* standard is inconsistent with the principles articulated by this Court in the summary judgment context. If there are disputed jurisdictional facts after substantial discovery, a court on application of any party can order a preliminary hearing pursuant to Rule 12(d), at which the higher preponderance standard applies.[21] If, however, the material jurisdictional facts are

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17 *Accord Cutco Indus. Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57, (2d Cir. 1985); *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985); *Perez-Rubio v. Wyckoff*, 718 F. Supp. 217, 227 (S.D.N.Y. 1989). *Contra Bracewell v. Nicholson Air Servs., Inc.*, 748 F.2d 1499, 1504 (11th Cir. 1985) (only accept allegations not controverted by defendant's evidence); *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1284 (9th Cir. 1977) ("we may not assume the truth of allegations in a pleading which are contradicted by affidavit"); *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977) (defendant cannot "simply rest on bare allegations of its complaint, but was obligated to come forward with facts, by affidavit or otherwise"); *In re North Dakota Personal Injury Asbestos Litig.*, 737 F. Supp. 1087, 1098 (D.N.D. 1990).

18 *See Morris v. SSE, Inc.*, 843 F.2d 489, 490-92 (11th Cir. 1989); *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1043 n.1 (S.D.N.Y. 1987). *See also* cases cited at note 10 *supra*.

19 *See* cases cited at note 10 *supra*.

20 *See* cases cited at note 11 *supra*.

21 *See* cases cited at note 13 *supra*.

essentially undisputed, as in the case below, a preliminary hearing is unnecessary. If a court, viewing the entire discovery record against the principles articulated in *International Shoe* and its progeny, can come to but one reasonable conclusion as to the jurisdictional issue, it should reach that conclusion at the 12(b)(2) stage. After substantial discovery a plaintiff is in no different posture in opposing a 12(b)(2) motion than in opposing a summary judgment motion. Consequently, the same standard of proof should govern disposition of the jurisdictional issue in either context.

In these circumstances anything less than the more rigorous preponderance standard is inherently unfair, violates "traditional notions of fair play and substantial justice," and is, thus, violative of due process. A defendant should not be forced to go through time consuming and expensive discovery, sometimes as in the case below lasting more than a year, only to have a court ignore evidence adduced in opposition to jurisdiction. Application of the *prima facie* standard requires a court to review only a plaintiff's jurisdictional evidence.[22] This is a waste of party, lawyer and judicial resources.

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22 In *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194 (2d Cir.), *petition for cert. filed*, 59 U.S.L.W. 3094 (U.S. July 24, 1990) (No. 90-207), the Second Circuit recently stated:

> Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, . . . legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's *prima facie* showing may be established solely by allegations. *After discovery*, the plaintiff's *prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant. At that point, the *prima facie* showing must be factually supported.

Id. at 197 (citations omitted). This language states that after discovery a plaintiff must factually support jurisdictional allegations, but implies that a court is not free to consider evidence adduced in opposition to jurisdiction, or to decide whether a rational trier of fact could find for plaintiff on the jurisdictional issue. The implication in *Ball* was made explicit by the Second Circuit earlier. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) ("a prima facie showing suffices, notwithstanding any controverting presentation by the moving party").

Despite feeble attempts to impose the higher preponderance standard in these circumstances,[23] lower courts are reluctant to apply it absent guidance from this Court. This Court should address this issue, and, consistent with principles of due process, mandate application of the preponderance standard by all lower courts when jurisdiction is tested after substantial discovery.

In the case below, application of the preponderance standard to the extensive discovery record taken as a whole would not have permitted a rational trier of fact to find for Hammond on the jurisdictional issue. Thus, Kramer's 12(b)(2) motion should have been granted. (*See* Reason III for Granting the Writ)

II.

BY JUSTIFYING JURISDICTION ON A MIX OF REASONABLENESS AND CONTACT ANALYSIS, WITHOUT INDEPENDENTLY FINDING SUFFICIENT "MINIMUM CONTACTS," THE SOUTH CAROLINA SUPREME COURT STRETCHED THE DUE PROCESS CLAUSE BEYOND ACCEPTABLE LIMITS

This court should decide whether the *World-Wide Volkswagen* reasonableness factors may be used to uphold jurisdiction in the absence of a threshold finding of purposefully established minimum contacts. This is a constitutional issue of great national importance because (1) it has never been definitively resolved by this Court, (2) there is extensive confusion on this issue in the lower courts, resulting in conflicts among the circuits, within the circuits, and among the high courts of the several states, and (3) until this Court authoritatively resolves this question, the confusion in the lower courts will continue to disrupt the orderly administration of justice in circumstances that are certain to arise frequently.

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23 *See* cases cited at note 11 *supra*.

A. This Court's division on minimum contacts and its reliance on "other factors" in striking down jurisdiction in *Asahi* leaves the law of personal jurisdiction fundamentally unsettled

In 1985 this Court articulated a two-branch due process test for state court jurisdiction. *Burger King v. Rudzewicz*, 471 U.S. 462, 471-78 (1985). The first branch, which remains "the constitutional touchstone," requires a state court to determine "whether a defendant purposefully established 'minimum contacts' in the forum state." *Id.* at 474 (citing and quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). This Court further explained that "[o]nce [that issue] has been decided" a court may consider "other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Id.* at 476 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

Less than two years later, this Court was unable to decide whether a third-party defendant established minimum contacts with California because two of three opinions issued in the case divided the Court into conflicting four-Justice pluralities on whether minimum contacts existed. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1987). All members of this Court, except Justice Scalia, however, evaluated the "other factors," and concluded that California's assertion of jurisdiction "would be unreasonable and unfair." *Id.* at 116. Justice Stevens, wrote separately, joined by Justices White and Blackmun, expressing the view that "*[a]n examination of minimum contacts is not always necessary* to determine whether a state court's assertion of personal jurisdiction is constitutional." *Id.* at 121 (emphasis added).

Because of this Court's division over minimum contacts, and the separate opinion of Justice Stevens that "*[a]n examination of minimum contacts is not always necessary*," lower courts have issued confusing and conflicting opinions on the necessity to make a threshold finding of minimum contacts,

before evaluating the "other factors" to determine whether a particular assertion of jurisdiction would offend "traditional notions of fair play and substantial justice.' "[24] This Court should decide this issue now and end the confusion.

B. Because of this Court's split in *Asahi* lower courts have been unable to determine what analysis is required under the due process clause when testing personal jurisdiction

Confusion generated by *Asahi* and *Burger King* has undermined consistency and predictability in jurisdictional decision making.[25] Conflicts at all levels abound and multiply with the publication of each new volume of case reports.

In striking down jurisdiction lower courts are divided over whether the "reasonableness" factors must be analyzed. Following the framework established in *Burger King*, many courts expressly find it unnecessary to reach the reasonableness factors if minimum contacts are lacking.[26] Others, how-

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24 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

25 This Court has stated that the "Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citation omitted).

26 Typical of this view is the First Circuit, which expressly labelled the "reasonableness" factors "secondary rather than primary," stating that "[a] reviewing court must first examine the defendant's contacts with the forum. If the same do not exist in sufficient abundance, that is, if the *constitutionally necessary first-tier minimum is lacking the inquiry ends.*" *Donatelli v. National Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990) (emphasis added). *Accord McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 817 & n.10 (9th Cir. 1988); *Chung v. NANA Dev. Corp.*, 783 F.2d 1124, 1126-27 (4th Cir.), *cert. denied*, 479 U.S. 948 (1986); *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 271-72 & n.1, 736 P.2d 2, 5-6 & n.1 (1987) ("Because we find that Tennessee Farmers has not purposefully engaged in forum activities . . . we do not address [the] additional factors."); *Felix v. Bomoro Kommanditgesellschaft*, 196 Cal. App. 3d 106, 117, 241 Cal. Rptr. 670, 676

ever, even in the absence of minimum contacts, consider second-branch factors because of *Asahi*.[27] Still others, finding support in the view of Justice Stevens that minimum contacts need not always be evaluated, base their decisions to dismiss exclusively on reasonableness factors.[28]

In upholding jurisdiction over nonresident defendants many lower courts consistent with *Burger King* discuss the

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(1987) ("Having determined that defendant's contacts with California are insufficient to justify jurisdiction, we need not undertake the additional process of balancing the inconvenience of defending the action in this state against the interests of plaintiff in suing locally and of the state in assuming jurisdiction."); *Missouri ex rel. Wichita Falls Gen. Hosp. v. Adolf*, 728 S.W.2d 604, 609 (Ct. App. Mo.) ("We do not find that sufficient minimum contacts are present here to require exploration of additional factors."), *cert. denied*, 484 U.S. 927 (1987).

27 *See, e.g., Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990) (expressly interpreting *Asahi* as mandating analysis of the "reasonableness" factors even in the absence of minimum contacts); *Dalton v. R&W Marine, Inc.*, 897 F.2d 1359, 1361-63 (5th Cir. 1990); *U.S.S. Yachts, Inc. v. Ocean Yachts, Inc.*, 894 F.2d 9, 11-13 (1st Cir. 1990); *Lak, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1303-05 (6th Cir. 1989), *cert. denied*, _____ U.S. _____, 110 S. Ct. 1525 (1990); *Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654, 661 (4th Cir. 1989); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987); *Wells Am. Corp. v. Sunshine Elecs.*, 717 F. Supp. 1121, 1124, 1128-29 (D.S.C. 1989); *Blue Ball Properties, Inc. v. McClain*, 658 F. Supp. 1310, 1320-21 (D. Del. 1987); *Camelback Ski Corp. v. Behning*, 312 Md. 330, 336 & n.3, 539 A.2d 1107, 1110 & n.3 (1988), *aff'g on rehearing*, 307 Md. 270, 513 A.2d 874 (1986), *vacated*, 480 U.S. 901 (1987) (for reconsideration in light of *Asahi*).

28 The Ninth Circuit has actively espoused this view. *See, e.g., Federal Deposit Ins. Corp. v. British-Am. Ins. Co.*, 828 F.2d 1439, 1442 (9th Cir. 1987) ("Because we find that the exercise of personal jurisdiction . . . is *unreasonable*, we need not determine whether [the minimum contacts branch] of the test [is] satisfied."); *Fields v. Sedwick Associated Risks, Ltd.*, 796 F.2d 299, 302 (9th Cir. 1986) ("Because we find that the defendants have presented 'a compelling case that jurisdiction would be unreasonable,' we need not address the [the minimum contacts branch] of the test."). *See also The Supreme Court, 1986 Term—Leading Cases*, 101 Harv. L. Rev. 119, 266 (1987) ("The uncertainties involved in deciding whether minimum contacts exist probably will lead courts to avoid the issue whenever they can rule out jurisdiction on the ground of unreasonableness.").

second branch-factors only after finding purposefully established minimum contacts.[29] Other courts, however, uphold jurisdiction on minimum contacts alone without any consideration of second-branch factors.[30]

Moreover, the Ninth Circuit has suggested in *dicta* that "there will be cases in which the defendant has *not* purposefully directed its activities at the forum state, but has created sufficient contact to allow the state to exercise personal jurisdiction if such exercise is sufficiently reasonable." *Brand v. Menlove Dodge*, 796 F.2d 1070, 1074 (9th Cir. 1986) (emphasis added). *Accord Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986).[31]

The confusion in the lower courts generated by *Asahi*, is in part attributable to the three members of this Court who after finding no minimum contacts in *Asahi*, nevertheless,

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29 *See, e.g., Creeh v. Roberts*, 908 F.2d 75 (6th Cir. 1990); *Gulf Consol. Servs., Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071, 1074-75 (5th Cir. 1990); *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 701-02 (3d Cir. 1990); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 386 (9th Cir. 1990); *Williams Elec. Co. v. Honeywell, Inc.*, 847 F.2d 741, 743-44 (11th Cir. 1988); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169-70 (6th Cir. 1988); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529-30 (4th Cir. 1987); *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 666 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987); *Mickleburgh Mach. Co. v. Pacific Economic Dev. Co.*, 738 F. Supp. 159, 163 (E.D. Pa. 1990); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 326-30, 558 A.2d 1252, 1257-58 (1989); *Northern Aircraft, Inc. v. Reed*, 572 A.2d 1382, 1386 (Vt. 1990).

30 *See, e.g., English & Smith v. Metzger*, 901 F.2d 36, 39-40 (4th Cir. 1990); *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 690-91 (3d Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3054 (U.S., June 29, 1990) (No. 90-33); *FMC Corp. v. Varonos*, 892 F.2d 1308, 1313-14 (7th Cir. 1990); *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382, 388-89 (11th Cir. 1989).

31 Some courts find that reasonableness factors such as convenience and forum state interest, "while . . . worthy of serious consideration, *cannot alone serve as the foundation for assumption of jurisdiction.*" *Camelback Ski Corp. v. Behning*, 307 Md. 270, 286, 513 A.2d 874, 882 (1986) (emphasis added) (citations omitted), *vacated*, 480 U.S. 901 (1987) (for reconsideration in light of *Asahi*), *aff'd on rehearing*, 312 Md. 330, 539 A.2d 1107 (1988).

went on to evaluate the reasonableness factors. The only reason to consider the second branch in these circumstances is if reasonableness can independently confer jurisdiction in the absence of minimum contacts. If so, then the entire relevance of traditional minimum contacts, which this Court has repeatedly called the "constitutional touchstone," is cast into serious doubt.

In the case below, Kramer had no meaningful "contacts, ties or relations" in or with South Carolina. Without making a specific finding that he purposefully directed activities at South Carolina in a manner sufficient either to invoke the benefits and protections of South Carolina law, or to reasonably anticipate litigation in South Carolina (Reason III for Granting the Writ), the South Carolina Supreme Court, nevertheless, "conclude[d] that conferring jurisdiction upon this state would pose no unusual inconvenience since all parties to the suit *except Kramer* are South Carolina residents." (388 S.E.2d at 799, App., at 5a.) (emphasis added).

By justifying jurisdiction on a mix of reasonableness and contact analysis, without independently finding sufficient "minimum contacts" to support jurisdiction, the South Carolina court stretched the due process clause beyond acceptable limits, and vividly illustrated the confusion caused by *Asahi*.[32] The conflicts among the lower courts on whether the reasonableness factors may be considered without first finding minimum contacts requires definitive resolution by this Court.

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32 The South Carolina due process test, which combines minimum contacts and reasonableness factors (*see* p. 6 *supra*) is likely to achieve this result often. Other courts also use due process tests that mix the two branches. *See, e.g., Caluri v. Rypkema*, 570 A.2d 830, 831 (Me. 1990); *Brown County Family Serv. Center v. Kahoun*, 427 N.W.2d 20, 22 (Ct. App. Minn. 1988); *ETR Corp. v. Wilson Welding Serv., Inc.*, 96 N.C. App. 666, 386 S.E.2d 766, 768 (1990); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990); *Boyd Nursery Co. v. Hill*, No. 01-A-01-95005-CH00170 (Ct. App. Tenn., Aug. 24, 1990) (1990 West Law 121571, at 5-6).

III.

THE SOUTH CAROLINA COURT'S DECISION CONFLICTS WITH THE HOLDINGS OF THIS COURT ON THE REQUIREMENTS FOR MINIMUM CONTACTS

Apart from citing two of this Court's decisions for general principles,[33] the minimum contacts analysis of the South Carolina Supreme Court is contained in seven operative sentences, which, rearranged to assist analysis, state:

(1) "The *pleadings allege* that Hammond was the object of the tortious conduct which resulted in financial benefit for Kramer, to Hammond's detriment."

(2) "The *record* in this case shows that the transaction in which Kramer participated involving South Carolina parties lasted for several months."

(3) "There is evidence in *the record* indicating that Kramer participated extensively from the initial meeting between Hammond and the California Group."

(4) "Kramer met with investors, negotiated with Evins and Case, and eventually became a principal officer and stockholder in Medstone."

(5) "Hammond was a major investor and would have been a necessary party to ongoing business transactions involving Kramer.

(6) "Further, we note from *the record* that the corporate by-laws of HTI state that Spartanburg, South Carolina, was to be the principal place of business and also that Spartanburg was listed on the corporate stationary."

(7) "Finally, *this record* contains written correspondence and evidence of telecommunications which, with

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33 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

> other evidence, is sufficient to overcome a motion to dismiss under Rule 12(b)(2)."

(388 S.E.2d at 799, App., at 5a-6a.) (emphasis added)

The South Carolina court relied on its own due process test originally articulated in 1960,[34] and not reformulated to reflect this Court's many intervening decisions, in finding the above facts sufficient to uphold jurisdiction over Kramer. Indeed, the opinion below was written as if this Court had never decided *Hanson v. Denckla*, 357 U.S. 235 (1958), which made "purposeful availment" the critical element of jurisdictional due process.[35] In *Hanson* this Court stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of defendant's activity, *but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.*

Id. at 253 (emphasis added). This oft-quoted reasoning of *Hanson* has recently been reaffirmed. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985). The court below also failed to consider *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), which added another crucial element to the analysis: "[T]he foreseeability that is criti-

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34 *See* page 6 *supra*. The first three considerations were originally articulated in *Boney v. Trans-State Dredging Co.*, 237 S.C. 54, 62, 115 S.E.2d 508, 512 (1960), more than thirty years ago. The final consideration was added by *Parker v. Williams & Madjanik, Inc.*, 270 S.C. 570, 576, 243 S.E.2d 451, 455 (1978), more than twelve years ago.

35 *See, e.g.*, Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. Rev. 407, 408-09, 412-13, 421-23 (1980); Perschbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in Burger King Corp. v. Rudzewicz*, 1986 Ariz. St. L.J. 585, 597-99.

cal to the due process analysis is . . . that the defendant's conduct and connection with the forum state are such that he should *reasonable anticipate being haled into court there.*" *Id.* at 297 (emphasis added) (citations omitted).

The facts relied on by the court below, including the amount of time the transaction lasted, Kramer's participation at the meetings between Hammond and the California Group (in California), Kramer's negotiation with "investors" (in Illinois and Indiana), Kramer's negotiations with Evins and Case (in California, New York and by phone), Hammond's status as a major investor and Kramer's becoming a principal officer of Medstone (after the events complained of when Medstone's principal place of business was in California), do not in any way establish that Kramer "deliberately" engaged in significant activities in or with South Carolina establishing a "substantial connection" by which he "purposefully availed" himself of the benefits and protections of South Carolina law. Neither do they show that Kramer should have reasonably anticipated being haled into a South Carolina court on a claim arising out of a business transaction centered outside of South Carolina, in which the transaction participants carefully avoided application of South Carolina law at every turn.

Not only do the statements of the South Carolina court fail to show purposeful availment or reasonable anticipation of forum state litigation, but the record before that court plainly established that Hammond had reached outside South Carolina to involve himself in the California Group's invention[36] and that the resulting business transaction was centered entirely outside of South Carolina. Consequently, Kramer did not have "fair warning" that he would be required to defend

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36 *See, e.g., Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 283 (7th Cir. 1990) ("One relevant inquiry is which party initiated the business transaction."). *Accord English & Smith v. Metzger*, 901 F.2d 36, 39 (4th Cir. 1990).

claims in South Carolina's courts.[37] The inventors were Californians and Hammond reached out to them in Colorado and California. The proposed corporation that resulted was chartered in Delaware. Principal efforts to sell a prototype of the invention to initially fund the corporation were made in Indiana and with Michael Reese in Illinois. Hammond sought the letter of credit essential to the Michael Reese sale in Alabama. Every meeting of the transaction participants occurred outside of South Carolina—*i.e.*, in California, New York, Indiana and Illinois. Moreover, each crucial agreement memorializing the underlying transaction choose governing law of states other than South Carolina. *See* page 4 *supra*.[38] All of these facts controverting jurisdiction in South Carolina were established by the discovery record and are undisputed. Yet the Court below ignored them because it applied the ineffectual *prima facie* standard to Kramer's 12(b)(2) motion. (*See* Reason I for Granting the Writ)

The only activity connecting Kramer to South Carolina was written correspondence and telecommunications. Kramer sent

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37 This Court has explained the crucial significance of the "purposeful availment" doctrine as follows:

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum state.

Burger King, 471 U.S. at 475 (citations and footnotes omitted) (emphasis in original text). Although the South Carolina Supreme Court's opinion partially cites these elements, it, nevertheless, failed to mention "unilateral activity of another party or a third person," which has crucial implications in this case. (388 S.E.2d at 799, App., at 6a). The unilateral decision of Hammond to reach out to California and enter into a business transaction with the California Group is the only reason Kramer had any contact with a South Carolina resident.

38 In addition, the record establishes Kramer had no traditional physical contact with South Carolina. He is neither licensed to practice law there nor has he ever solicited clients there. He owns no property there. He has no bank accounts there. He has no business interests there. He has not once set foot in South Carolina. (Kramer Aff. ¶ 18, R. 1045)

drafts of documents and made and received telephone calls from South Carolina during negotiation of the underlying business transaction. But these communications were exclusively with Hammond's counsel, even though Hammond participated in a few telephone conferences. They resulted from Kramer's fulfilling his engagement to his California clients. Moreover, there is not a scintilla of evidence in the extensive record below showing that Kramer committed any wrongdoing or any of the misconduct Hammond alleges during any of these communications, or by any other conduct. Accordingly, Hammond cannot show that his claims arise out of any forum state contact by Kramer, a necessary element for specific jurisdiction under the due process clause.[39]

In upholding jurisdiction over Kramer, the court below also relied on the corporate by-laws of the then newly chartered Delaware corporation, which state that the "principal office shall be located in or near . . . Spartanburg." (R. 1103) Had the lower court imposed the "preponderance" standard (Reason I for Granting the Writ) to Kramer's 12(b)(2) motion, evidence in the record demonstrating the jurisdictional irrelevance of the by-laws would have been considered. Imposition of the lower *prima facie* standard allowed the court below to ignore at least three matters established by the record demonstrating the immateriality of the by-laws. First, the by-laws were boilerplate by-laws of the Butler, Means firm. Second, at that time, the company, albeit incorporated, had no shareholders, no capital and no business. Third, and most significantly, the Hammond-Wallace agreement, dated November 6, 1984, and executed by Hammond fifteen days after the by-laws were adopted, recites that "the location for manufacturing of the . . . machines and the site for the location of the principal office of [the company] has

39 A state exercises specific jurisdiction only over claims arising out of a defendant's contacts with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984).

not yet been determined." (R. 422)[40] Eventually the company's principal office and manufacturing facilities were located in California.

When applied to *Hanson*'s "purposeful availment" and *World-Wide Volkswagen*'s "reasonable anticipation" doctrines, the collective irrelevance of the facts relied on by the court below is obvious, and the collective significance of the record "facts" ignored by the court is apparent. The South Carolina Supreme Court's opinion is wrong, and when the entire discovery record, including evidence controverting jurisdiction, is tested under the due process analysis articulated by this Court, the result is wrong as well.

Borrowing Winston Churchill's description of Russia in the 1930's, the First Circuit recently described "the doctrinal vagaries of the concept of personal jurisdiction," as a "riddle wrapped in a mystery inside an enigma."[41] By granting the writ and resolving the issues presented, this Court has an opportunity to solve the "riddle," unwrap the "mystery," and explain the "enigma."

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40 The South Carolina court's reliance on the listing of Spartanburg on the corporate stationery of Medstone is even less significant. The record contains a letter on Medstone, International, Inc. stationery, dated June 10, 1985, which was long after the events raised in Hammond's complaint. (R. 965) Although the court correctly noted that Spartanburg was listed, it failed to note that New York, New York, Irvine, California and Richmond, Virginia were also listed as office locations of Medstone. (R. 965).

41 *Donatelli v. National Hockey League*, 893 F.2d 459, 462 (1st Cir. 1990).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 7, 1990

APPENDIX

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

GAINES W. HAMMOND, JR.,

Respondent,

—v.—

BUTLER, MEANS, EVINS & BROWN, THOMAS A. EVINS, STANLEY T. CASE and ALAN S. KRAMER,

Defendants,

of whom ALAN S. KRAMER is

Appellant.

APPEAL FROM SPARTANBURG COUNTY
WILLIAM H. BALLENGER, JUDGE

Opinion No. 23142

Heard February 21, 1989—Filed January 22, 1990

AFFIRMED

J. D. TODD, JR., and O. DOYLE MARTIN, both of Leatherwood, Walker, Todd & Mann, of Greenville, *for appellant*.

A. CAMDEN LEWIS and MARY G. LEWIS, both of Lewis, Babcock, Pleicones & Hawkins, of Columbia, *for respondent*.

FINNEY, A.J.: This appeal involves the question of whether a South Carolina court may exercise personal juris-

diction over a nonresident, appellant Alan S. Kramer (Kramer), who resides and practices law in New York City. Kramer moved to dismiss the action against him for lack of personal jurisdiction. The trial court held that the long-arm statute and minimum contact requirements had been satisfied; therefore, South Carolina could exercise personal jurisdiction. We affirm the trial court's decision.

Respondent Gaines W. Hammond, Jr. (Hammond), is a businessman-urologist who practices in South Carolina. Until late 1984, he was represented in the business transaction which led to this lawsuit by defendants Stanley T. Case (Case) and Thomas A. Evins (Evins), partners in the South Carolina law firm of Butler, Means, Evins & Brown (Butler Firm). Kramer represented three Californians (California Group) who invented a non-surgical medical technology for treatment of kidney stones.

In July 1984, Hammond talked with one of the inventors about acquisition of rights to this new technology. In August 1984, Hammond decided to try to obtain a license from the California Group, and a meeting was held in California. At this meeting, Kramer represented the California Group, and Hammond was represented by Evins and Case.

Subsequently Hammond paid the California Group $50,000 for an option to acquire the right to license the technology for $1,000,000. The option was due to expire October 22, 1984, but could be extended until November 8, 1984, for an additional $25,000. The designated licensee was a newly-formed Delaware corporation, Hammond Technologies, Inc. (HTI).

Hammond was not successful in finding a purchaser for a prototype of the machine by the end of the first option period, so he paid the additional fee to extend the option. Michael Reese Hospital in Chicago, the principal prospect, agreed to the purchase on certain conditions, one of which was a letter of credit for $400,000.

Hammond entered into a contract with Dr. Gerald Wallace of Mobile, Alabama, to secure the letter of credit. Wallace specified prerequisites to providing the letter of credit, and the California Group required modifications of the

Hammond-Wallace contract. The transactions among the parties were not finalized by November 8, 1984, and the option expired.

By November 14, 1984, HTI had undergone organizational changes which included a name-change to Medstone International, Inc. (Medstone), and amendment of the subscription agreement that was executed by all parties. Thereafter the California Group granted the license to Medstone, which completed the transaction with Michael Reese Hospital. The stock ownership of Medstone always has been the principal issue in this controversy. Initially, terms concerning stock ownership were reflected in a subscription agreement dated in September 1984 which allocated 70,000 out of 100,000 shares of the company to Hammond. Hammond alleges that as a result of modification of the subscription, he was allocated only 10,000 shares. Kramer became president of the company, and Hammond became one of the vice presidents. They worked together as officers and directors until July 1985, when Hammond ceased active participation in Medstone.

Hammond filed suit against the Butler Firm, Kramer, Evins and Case in March of 1986. Hammond's complaint alleged conspiracy, fraud and deceit, breach of fiduciary duty, negligence, slander, and violation of the South Carolina Unfair Trade Practices Act.

Hammond claims that from August through November 14, 1984, Kramer and Evins conspired to prevent him from obtaining a controlling share of Hammond Technologies, Inc. (now Medstone International, Inc.). Further, Hammond alleges that Kramer and the Butler Firm conspired to defraud him of Medstone stock through delay and misrepresentation, resulting in the drastic reduction of Hammond's shares while Kramer's shares increased in number.

On the basis that he had absolutely no contact with or activities in South Carolina, Kramer moved to dismiss the complaint against him for lack of personal jurisdiction. The trial court denied the motion. Kramer appeals.

Notwithstanding the fact that at trial the burden of establishing jurisdiction is upon the party seeking to invoke the

jurisdiction of the courts of this state against a nonresident by utilization of our long-arm statute, *Yarborough and Company v. Schoolfield Furniture Industries, Inc.*, 275 S.C. 151, 268 S.E.2d 42 (1980), at the pre-trial stage of the proceedings, the plaintiff need only make a prima facie showing by pleadings and affidavits. *Askins v. Firedoor Corporation of Florida*, 281 S.C. 611, 316 S.E.2d 713 (Ct. App. 1984); *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976).

There is a two-step approach to determining whether our courts may exercise personal jurisdiction over a nonresident. The first step is whether the nonresident's conduct meets the requirements of South Carolina's long-arm statute; and second whether, under the particular circumstances, a finding of minimum contacts comports with "traditional notions of fair play and substantial justice." *Hume v. Durwood Medical Clinic, Inc.*, 282 S.C. 236, 318 S.E.2d 119, *cert. granted*, 327 S.E.2d 32, *cert. dismissed*, 329 S.E.2d 443 (1984), (quoting *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed 95 (1945)).

South Carolina's long-arm statute, S.C. Code Ann. Section 36-2-803 (1976), reads in pertinent part:

> (1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's
>
> (a) transacting any business in this State;
>
> . . .
>
> (c) commission of a tortious act in whole or in part in this State;
>
> . . .

In certain instances, an out-of-state defendant may be subject to jurisdiction under a long-arm statute on the theory that his co-conspirator conducted activities in a particular state pursuant to the conspiracy. *Ghazoul v. International Management Services, Inc.*, 398 F. Supp. 307 (S.D.N.Y. 1975). A civil conspiracy consists of three elements: (1) A combination of two or more persons, (2) for the purpose of

injuring the plaintiff, (3) which causes the plaintiff special damages.

The respondent alleges that Kramer, the Butler Firm, Evins and Case conspired to defraud him, that the plan was carried out by delay and misrepresentation, and that as a result of this alleged conspiracy, he has been injured.

We find that the allegations contained in Hammond's pleadings and affidavits are sufficient to invoke the long-arm statute under the provisions of § 36-2-803(1)(C).

The second step in determining jurisdiction is whether a nonresident defendant has established minimum contacts which meet the due process requirement. *International Shoe Co. v. State of Washington, supra.* This test requires that the state's exercise of jurisdiction not offend traditional notions of fair play and substantial justice, and is based on four considerations:

1. The duration of the activity of the non-resident within the state;
2. The character and circumstances of the commission of the non-resident's act;
3. The inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the non-resident; and
4. The state's interest in exercising jurisdiction.

Colite Industries v. G. W. Murphy Const., 297 S.C. 426, 377 S.E.2d 321 (1989).

The record in this case shows that the transaction in which Kramer participated involving South Carolina parties lasted for several months. The pleadings allege that Hammond was the object of the tortious conduct which resulted in a financial benefit for Kramer, to Hammond's detriment. Finally, we conclude that conferring jurisdiction upon this state would pose no unusual inconvenience since all parties to the suit except Kramer are South Carolina residents.

Moreover, jurisdiction may not be avoided merely because the defendant did not physically enter South Carolina. The constitutional touchstone remains whether the defendant pur-

posely established minimum contacts in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985). This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or attenuated" contacts. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d. 790 (1984).

There is evidence in the record indicating that Kramer participated extensively from the initial meeting between Hammond and the California Group. Kramer met with investors, negotiated with Evins and Case, and eventually became a principal officer and stockholder in Medstone. Hammond was a major investor and would have been a necessary party to ongoing business transactions involving Kramer. Further, we note from the record that the corporate by-laws of HTI state that Spartanburg, South Carolina, was to be the principal place of business and also that Spartanburg was listed on the corporate stationery.

Finally, this record contains written correspondence and evidence of telecommunications which, with other evidence, is sufficient to overcome a motion to dismiss under Rule 12(b)(2). *See Kimball v. Schwartz*, 580 F. Supp. 582 (W.D. Pa. 1984); *Sterling Indus. Corp. v. Telephone, Inc.*, 484 F. Supp. 1294 (D.C. Mich. 1980).[1]

We affirm the decision of the trial court denying appellant's 12(b)(2) motion challenging jurisdiction of the South Carolina courts.

AFFIRMED.

GREGORY, C.J., HARWELL, CHANDLER and TOAL, JJ., concur.

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1 Our conclusion in this case is consistent with the Court of Appeals' decision in *Allen v. Columbia Financial Management Ltd.*, 297 S.C. 481, 377 S.E.2d 352 (Ct. App. 1988).

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Filed August 11, 1987

COURT OF COMMON PLEAS
86-CP-42-574

GAINES W. HAMMOND, JR.,

Plaintiff,

—versus—

BUTLER, MEANS, EVINS AND BROWNE; THOMAS A. EVINS, STANLEY T. CASE, and ALAN S. KRAMER,

Defendants.

ORDER

This matter came before me for hearing on May 26, 1987 pursuant to a Motion to Dismiss Defendant Alan S. Kramer from this action. Present at the hearing were attorneys for all parties.

At the pretrial stage, a plaintiff need only make a *prima facie* showing that the trial court should exercise *in personam* jurisdiction over the defendant. After hearing arguments of counsel and after a thorough review of the extensive record in this matter, including Plaintiff's pleadings and affidavits, I find that Plaintiff has met that burden and that the Motion to Dismiss should be denied.

This is an action based upon malpractice, breach of fiduciary duty, breach of contract, negligence, fraud and conspiracy. Although contact with South Carolina may not have been extensive, there is sufficient evidence to show that there

was contact with this State and that Defendant Alan S. Kramer was significantly involved in the developments concerning this medical technology. I find that there was contact by telephone and by other means of correspondence, as well as an intention to place one of the first machines in South Carolina. In addition, Defendant Kramer was President of Hammond Technologies, Inc., later known as Medstone, which had its principal place of business in South Carolina and which was formed to commercialize this technology. Kramer negotiated the placement of the machine and represented the company in other legal and business matters.

In light of these findings, I conclude that the Court should maintain personal jurisdiction over Defendant Alan S. Kramer and that doing so conforms with the requirements of the Long Arm Statute and does not offend "traditional notions of fair play and substantial justice."

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss Defendant Alan S. Kramer is denied.

AND IT IS SO ORDERED.

s/ WILLIAM H. BALLENGER
William H. Ballenger
JUDGE, TENTH JUDICIAL CIRCUIT

Walhalla, South Carolina

August 8th, 1987

[LETTERHEAD OF THE SUPREME COURT
OF SOUTH CAROLINA]

June 11, 1990

O. Doyle Martin, Esquire
100 East Coffee Street
P. O. Box 87
Greenville, S. C. 29602-0087

Re: Gaines W. Hammond, Jr. v. Butler, Means, Evins and Browne, Thomas A. Evins, Stanley T. Case, and Alan S. Kramer

Dear Mr. Martin:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
Denied.

s/ GEORGE T. GREGORY, JR. C.J.

s/ DAVID W. HARWELL A.J.

s/ A. LEE CHANDLER A.J.

s/ ERNEST A. FINNEY, JR. A.J.

s/ JEAN H. TOAL A.J.

June 11, 1990."

The remittitur in this matter is today being forwarded to the Clerk of Court for Spartanburg County.

We have received a letter withdrawing the Motion for Partial Remand in this matter. This letter is to advise that there will be no action taken on this Motion.

By copy of this letter, we are advising that there will be no action taken on the Motion to Strike in this matter since the Petition for Rehearing has been denied.

Sincerely yours,

s/ CLYDE N. DAVIS, JR.
CLERK

CND,Jr./dmh

cc: A. Camden Lewis, Esquire
Mary G. Lewis, Esquire

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

(a) When Presented. A defendant shall serve his answer within 30 days after the service of the complaint upon him, unless the Court directs otherwise when service of process is made pursuant to Rule 4(e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 30 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the Court: (1) if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action; (2) if the Court grants a motion for a more definite statement the responsive pleading shall be served within 15 days after the service of the more definite statement, and a responsive pleading, if necessary, shall be served within 15 days after notice of the court's action on a motion to strike.

(b) How Presented. Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or

more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a cause of action or defense to which an adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that cause of action or defense. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings ae presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(8) in subdivision (b) of this rule, whether made in a pleading or by motion, motions for judgment on the pleadings under subdivision (c) of this rule, and motions for summary judgment under Rule 56, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the

Court is not obeyed within 15 days after notice of the order or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a cause of action upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

[Amended effective May 1, 1986.]

Notes

This Rule 12(a) is identical to the Federal Rule except that it changes the time to answer from 20 to 30 days, and the time to plead after motion denied from 10 to 15 days. No other changes in State practice are affected by the Rule.

This important Rule 12(b) enables a party to: (1) raise by motion or answer all of the defenses now raised by demurrer, and (2) eliminates the necessity of the awkward "special appearance to object to jurisdiction" under present State practice. The motion should be made before answer for early disposition of cases; but the defenses enumerated may be made in the responsive pleading and are not waived by being stated in a pleading rather than by motion. The last sentence eliminates the so-called "speaking demurrer" at trial, by treating such late motion as a motion for Summary Judgment under Rule 56.

This Rule 12(c) preserves the present common law practice in this State; and it is more important than the Federal Rule, because of the requirement for fact pleading. It may also be treated as a motion for summary judgment in proper circumstances.

This Rule 12(d) is the same as the Federal Rule, and assures timely disposal of 12(b) and 12(c) motions to dismiss or for judgment prior to trial.

This Rule 12(e) is the same as the Federal Rule and effects no change in present practice, except time for compliance is changed from 10 days to 15 days.

This Rule 12(f) preserves present State practice under Code § 15-13-60 and § 15-13-440 verbatim.

This Rule 12(g) is the same as the Federal Rule. It is new material to help prevent piecemeal presentation of defenses by separate motions.

This Rule 12(h) should be read together with Rule 12(g) in defining those defenses which are waived if not presented by pleading or motion.

Notes to 1986 Amendments

The amendment to Rule 12(a)(2) sets the time for response after a motion to strike at 15 days, which is the same time set for pleading after a successful motion for a more definite statement.

The amendment to the fourth sentence of Rule 12(b) clarifies the litigant's right to assert at trial any defenses as well as any claims he could have raised in a permissive pleading but chose not to do so. Consequently, the election not to reply to an affirmative defense does not waive the right to contest that affirmative defense.

The amendment to Rule 12(f) makes clear that a motion to strike must point out the defects complained of, and is consistent with the language of Rule 12(e).

§ 36-2-803. Personal jurisdiction based upon conduct.

(1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's

(a) transacting any business in this State;

(b) contracting to supply services or things in the State;

(c) commission of a tortious act in whole or in part in this State;

(d) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State; or

(e) having an interest in, using, or possessing real property in this State; or

(f) contracting to insure any person, property or risk located within this State at the time of contracting; or

(g) entry into a contract to be performed in whole or in part by either party in this State; or

(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

(2) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him, and such action, if brought in this State, shall not be subject to the provisions of § 15-7-100(3).